

### **REMARKS**

Applicants courteously solicit favorable reconsideration of this application upon entry of the present Amendment.

#### **Claims**

Elected claims 1-7, 16-18, 21, 22, 23, 24 and 25 are presented. Amended claim 22 adapts the Examiner's suggestion. New claim 25 relates to claim 7 but is written so as to be part of the elected invention(s).

The elected claims 1-7, 16-18, and 23 pertain to a UHT-treated product that has a relatively low viscosity after heat treatment (UHT). It can be sterilized. The UHT-treated product is reheatable and, when reheated, exhibits a viscosity increase as recited in claims 1, 22 or 24, to mention examples. The elected claims 22 and 24-25 relate to the reheated product.

#### **Traversing the Rejections**

Applicants traverse the rejection of claims 1-7, 16-18, and 21-24 under 35 U.S.C. §103(a) as being unpatentable over Kettlitz et al. (U.S. 6,235,894) in view of Daenzer-Alloncle et al. (U.S. 6,139,896). It is respectfully submitted that the rejected and added claim(s) would have been unobvious over the cited references.

Applicants courteously submit the references do not teach the present inventions, would not have been combined and, furthermore, even if, *arguendo*, they were combined, the elected claimed inventions would have been unobvious to a person of ordinary skill in the art.

I. The prior art does not teach (A) "wherein, after UHT-treatment, said UHT-treated product has a viscosity between 0.10 to 0.50 times the viscosity obtainable after re-heating of said UHT-treated product" as in claim 1; "wherein the UHT-treated product has a viscosity that increases upon reheating, and whereby the viscosity is 0.15 to 0.50 times the viscosity obtained after reheating the UHT-treated product in step (f)" as in claim 22; or "said product has been UHT-treated before reheating to obtain a UHT-heated product, and said UHT-heated product has a viscosity that is below 1500 mPa.s and is 0.15 to 0.50 times the viscosity of said reheated food product, said reheated food product having a viscosity above 2000 mPa.s" as in claim 24.

Kettlitz would not have suggested an increase in viscosity as recited in claims 1, 22 or 24. Kettlitz discloses stabilized starches that *maintain/retain* their pre-existing viscosity *even after reheating*. Kettlitz states the “high viscosity is also retained after repeated heating and cooling.” Kettlitz at col. 4, lines 30-31. This would not have suggested the viscosity recitations in any of claim 1, claim 22 or claim 24, especially not the increase in viscosity upon reheating the UHT-treated product, and certainly not the viscosity recited in the heating, cooling and reheating in claim 22.

Besides, Kettlitz elsewhere refers to “heat-stable high viscosity starches” (Abstract) and at column 4, lines 7-8, and lines 12-16, Kettlitz explains:

The products of the present invention are starches which ... have been modified in such a way that they retain a high viscosity even upon prolonged heating.

\* \* \*

The starches of the present invention show only a slight decrease of viscosity during the measurement with the Brabender viscograph, preferably the drop in viscosity is less than 20%[,] more preferably less than 10%[,] during heating at 95°C.

As a consequence, Kettlitz would not have suggested the viscosity recitations in any of claim 1, claim 22 or claim 24, especially since Kettlitz specifically states that the viscosity is retained/maintained upon repeated reheating and cooling.

Applicants have considered the Office Action at page 4 and its citations to Kettlitz. The Office Action cites a paragraph mentioning heating (Kettlitz, col. 1, lines 46-50). That paragraph refers to “cooking stable starches” (col. 1, line 46). An antecedent to “cooking stable starches” includes col. 1, lines 35-36 that refer to a heat stage that “guarantees a stable paste viscosity.” It is consistent with the subsequent Kettlitz teaching in col. 4 that the modified starches have a stable viscosity upon repeated heating and cooling. In short, a “stable paste viscosity” is not the viscosity increase recited in Applicants’ claim 1, claim 22 or claim 24, nor is it what is alleged in the Office Action.

II. The prior art does not teach “a UHT-treated product comprising a stabilized starch n-alkenyl succinate as a texturizing agent...” The Office Action acknowledges “Kettlitz et al do not specifically disclose UHT treatment of the food products.” Office Action, page 4.

III. Applicants submit Kettlitz would not have been combined with Daenzer-Alloncle because a fluid lactic cream product is not even meant to be reheated.

If one of ordinary skill in the art were even considering a reheatable UHT-treated product and considering viscosity retention or even increasing viscosity, the secondary reference to Daenzer-Alloncle would not have been among the documents and literature considered. Indeed, the secondary reference seeks to provide a fluid lactic cream having good viscosity despite reduced fat content. It is consumed “as is”, cold, without any reheating, nor does it suggest reheating to achieve a thickening effect, since such an effect is not germane to a fluid lactic cream.

In other words, Daenzer-Alloncle refers to fluid lactic creams, and those who are skilled in the art understand that such fluid lactic creams are typically consumed cold. Thus there would have been no reason to reheat a fluid lactic cream. There would have been no reason to expect or to consider increased viscosity (thickening effect) after heating the already UHT-treated food product. That is, Daenzer-Alloncle would not have suggested a UHT-treated product that should develop its viscosity when re-heated.

Moreover, Daenzer-Alloncle refers a viscosity of 250 to 1600 mPas, whereas Applicants’ claim 7 states that after UHT treatment, the viscosity is less than 1500 mPas, but after reheating it is above 2000 mPas.

V. Even if, for the sake of argument, Kettlitz would have been combined with Daenzer-Alloncle, the combined teaching would not have led to the present claimed inventions.

Taking the combined references at face value, the use of a stabilized, heat-treated starch according to the Kettlitz patent, even if considered with the product according to Daenzer-Alloncle, might have led -- *arguendo* -- to a product having a retained/maintained viscosity as taught by Kettlitz (see Kettlitz at col. 4, lines 5-16) and that might be storage-stable according to Daenzer-Alloncle.

In short, a person of ordinary skill in the art would have had no incentive or reason to select for UHT-treated products that particular starch of Kettlitz for use in Daenzer-Alloncle, nor selecting it for solving Applicants’ problem. Restated, Applicants confronted a problem needing a solution, namely, the provision of a heat-treated, sterilized product having a relatively low viscosity after a UHT treatment,

and displaying an increased viscosity when reheated. Kettlitz does not mention UHT-treatment and, furthermore, teaches products that maintain a stable high viscosity upon reheating or cooling. Kettlitz specifically discloses the “high viscosity is also retained after repeated heating and cooling” (col. 4, lines 30-31). These gaps in the teachings of the prior art cited against the claims are not overcome by citation to the fluid lactic cream products according to Daenzer-Alloncle.

Therefore, even if Daenzer-Alloncle would have been combined with Kettlitz, the combination would not have suggested the viscosity increase by re-heating the UHT-heated product as stated in claim 1, claim 7, claim 22 or claim 24.

VI. Applicants respectfully request reconsideration and withdrawal of the reasoning advanced in the Office Action. Applicants courteously submit the rejection lacks an evidentiary foundation.

There is no evidence cited in the Office Action to establish if the product made with a Kettlitz modified starch would be suitable for the purposes stated in Daenzer-Alloncle.

There is no factual evidence cited in the Office Action to show what would be the appearance of the product if a starch according to Kettlitz was used in Daenzer-Alloncle.

Applicants respectfully request a declaration from the Examiner setting forth a factual basis for (1) reheating a fluidic lactic cream; (2) why a person of ordinary skill would have considered reheating such a fluidic lactic cream with an expectation that its viscosity would increase as recited in the claims; and (3) asserting that “viscosity after re-heating, this characteristic would have been expected to be in the claimed range...” in view of Kettlitz at col. 4, lines 5-16.

## VII. Conclusion

Applicants, therefore, courteously solicit favorable reconsideration and allowance. Upon indication of allowable subject matter, Applicants authorize the Examiner to cancel without prejudice or disclaimer the non-elected claims in order to place the application in condition for allowance.

The Examiner is courteously invited to contact Applicants’ legal representative in an effort to resolve any remaining issues.

VIII. Fees

To the extent necessary during prosecution, Applicants hereby request any required extension of time not otherwise requested and hereby authorize the Commissioner to charge any omitted fee required to secure entry of this Amendment, including application processing, extension, and extra claims fees, to Deposit Account No 06-1135 regarding our order number 7393/84061.

Respectfully submitted,

**FITCH, EVEN, TABIN & FLANNERY**

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